Supreme Court, U.S.
FILED
DEC 8 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No. 1070

LUTHER ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner, LUTHER ROY, who respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1257 (3) of Title 28, United States Code, directed to the Appellate Court of Illinois, First Judicial District, to review an order and judgment of that court entered on April 4, 1970. A timely petition to the Supreme Court of Illinois for leave to appeal was denied on October 5th, 1970. Both opinions are more particularly described in the petition, and petitioner seeks such other and further relief as may be just and proper.

Luther Roy

Luther Roy #40236
Illinois State Penitentiary
Joliet, Illinois 60434

Petitioner pro se.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No.: _____

LUTHER ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

CERTIFICATE OF SERVICE UPON THE RESPONDENT.

I hereby certify that on the 13th day of November, 1970, three (3) copies of the Petition for Writ of Certiorari, and three (3) copies of the Motion for Leave to File and Motion to Forego Printing, and affidavits in support, were mailed, postage-paid, to Edward V. Hanrahan, State's Attorney of Cook County, Illinois, Chicago Civic Center, Chicago, Illinois 60602.

I further certify that all parties required to be served have been served.

Luther Roy

Luther Roy #40264
Box 112 Stateville Branch
Illinois State Penitentiary
Joliet, Illinois 60434

SUBSCRIBED and SWORN TO
before me on this 23 day
of November, A.D. 1970.

Notary Public

My commission expires on the 14th day of November, A.D. 1972.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No. _____

LUTHER ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION TO DISPENSE WITH PRINTING OF PETITION AND PRINTING OF THE APPENDIX.

Now comes Luther Roy, petitioner in the above-entitled cause, and moves for leave to file the hereto attached petition for a writ of certiorari and attached appendix in unprinted form. In support of this motion, petitioner states:

He is presently imprisoned in the Illinois State Penitentiary and is paid no salary whatsoever. Petitioner possesses less than two-hundred-dollars ($200.00) of which he is submitting a sum of one-hundred-dollars ($100.00) to the Clerk of the Supreme Court of the United States for docket fees of this petition for a writ of certiorari. Therefore, after payment of said docketing fees petitioner does not have sufficient funds to pay the cost of printing the petition and appendix.

WHEREFORE petitioner prays that an order be entered dispensing with the printing of the petition and appendix in this case and allowing petitioner to file forty (40) type-

written copies of said petition and appendix with the Court and three (3) typewritten copies of said petition and appendix upon the respondent.

Luther Roy
Luther Roy #[illegible]
Illinois State Penitentiary
Joliet, Illinois 60434

Petitioner pro se.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No. _____

LUTHER ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Luther Roy #40266
Illinois State Penitentiary
Joliet, Illinois 60434

Petitioner pro se.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No. _____

LUTHER ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in the above entitled cause on April 4th, 1970.

CITATIONS TO OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, appears in Appendix A hereto, infra, App. p. 1.

JURISDICTION

The judgment of the Appellate Court of Illinois, First Judicial District, was entered on April 4th, 1970. A timely petition to the Supreme Court of Illinois for leave to appeal was denied on October 5th, 1970. The jurisdiction of this court is invoked under Title 28, U.S.C., §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1) Whether Appellate Court of Illinois improperly allowed and accepted the State's reliance upon Orozco v. Texas, 428 S.W.2d 666 when it was admitted that said case was overturned by the Supreme Court of the United States in 89 S.Ct., at 1095.
2) Whether Appellate Court of Illinois has overruled the Supreme Court of the United States decision in Miranda v. Arizona, 384 U.S. 436.
3) Whether Appellate Court of Illinois improperly permitted an incriminating statement by the appellant-petitioner to stand when said statement was made after arrest and without prior constitutional warnings.

STATEMENT OF THE CASE

The petitioner was arrested on October 5, 1967, on a charge of indecent liberties. On December 18, 1967, a preliminary hearing was held. The case then proceeded to trial before the court without a jury. Testimony of the alleged victim of the offense revealed the boy to be thirteen years of age and attending junior high school. The boy attended classes in the morning and then 'cut' school, meeting the petitioner by accident in a restaurant. The boy attempted to sell the petitioner tickets for a function being held at his school. Petitioner agreed to buy the tickets but stated he would have to go to his apartment and obtain the money. The boy left his bicycle at the restaurant and rode with the petitioner in his car.

The alleged incident took place in the petitioner's apartment, according to the boy. Petitioner maintains they watched the World Series on television. Petitioner drove the boy back to the restaurant.

When the boy arrived to his home he received telephone calls from his sister and mother and was confronted with skipping school

that afternoon. He then told his family the petitioner caused him to miss school by taking him to his apartment and the alleged incident. Later that day the boy and his mother and his father went to the vicinity of the petitioner's apartment and noted the license plate number of petitioner's automobile parked in front of his apartment.

The local police officers testified that they arrived at the petitioner's apartment at approximately 8:55 P.M. Upon knocking at the door the petitioner opened the door clad in his pajamas. The officer testified that he asked the petitioner if his name was Luther Roy and if he owned the automobile parked outside. Petitioner responded in the affirmative to both questions.. The officer then told the petitioner "if he would come down to the Harvey Police Station with us, we would like to talk to him." The petitioner consented, and upon in the process of changing his clothes, he asked the officers, "Is that about the boy I had up here?"

Petitioner file a pre-trial motion to suppress certain statements allegedly made by him on the day of the incident, among which was the foregoing statement. Petitioner testified that shortly before 9:00 P.M. on the day in question, two uniformed police officers came to his apartment and inquired of him whether he had taken a boy for a ride in his automobile. Petitioner replied in the affirmative, and the officers thereupon told him to accompany them to the police station. Petitioner testified that the officers stated that no complaint had been filed against him. And that the officers would not tell him why there was any possibility of a complaint being filed against him when he inquired. When the petitioner asked to telephone his wife, who was attending a meeting, the officers refused to allow him to use the phone in his own home. The officers assured him that phone calls would be permitted later.

Petitioner testified to accompanying the officers to the police station and that it was after 11:00 P.M. that same evening before he could contact his family so they might contact an attorney.

While the petitioner was held incommunicado from his family he was questioned by the police and the boy's mother was alcowed to see the petitioner and spoke with him.

At the pre-trial suppression hearing the arresting police officer testified that the petitioner was willing to go with the officers and that as he was changing his clothes, the petitioner asked the officers, "Is this about the boy that was up here?" The officer stated that he responded, "What boy?" and that the petitioner replied, "The one I had in the car." The officer testified that the petitioner then told him that he picked the boy up at a restaurant, took him for a ride, brought him up to his apartment, and then took the boy back to the restaurant. The officer finally testified that the petitioner was given no constitutional warnings because he had made the statements before they arrived at the station and the warning was only needed after they reached the station.

On cross-examination the officer testified that when he and his partner first entered the petitioner's apartment he did ask the petitioner whether he had taken the boy for a ride.

The trial court suppressed all statements made by the petitioner except the one "Is that about the boy I had up here?" The petitioner maintained through his trial that the trial court committed error in admitting the statement inasmuch as it was made after he was placed under arrest and without prior constitutional warnings.

Petitioner was convicted and was sentenced to four to five years in the State penitentiary.

Petitioner took his timely appeal to the Appellate Court of Illinois, First Judicial District, where the court affirmed his conviction and stated: "The officers in the instant case merely knocked on the door to defendant's apartment, asked the defendant if he was Luther Roy, and asked if he owned the automobile parked outside. Defendant responded in the affirmative to both questions, and also consented to going with the officers to the police

station. While defendant was in the process of changing clothes, he asked the officers if the matter concerned the boy he was with earlier that day. The defendant was not under arrest at the time the statement was made, the statement was made voluntarily and was not prompted by any police questioning."

Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied without a hearing.

REASONS FOR GRANTING WRIT

1) WHETHER APPELLATE COURT OF ILLINOIS IMPROPERLY ALLOWED AND ACCEPTED THE STATE'S RELIANCE UPON OROZCO V. TEXAS, 428 S.W.2d 666 WHEN IT WAS ADMITTED THAT SAID CASE WAS OVERTURNED BY THE SUPREME COURT OF THE UNTIED STATES IN 89 S.Ct., AT 1095.

While the State in its brief placed reliance upon the decision of Orozco v. Texas, 428 S.C.2d 666 (See Appendix B) the petitioner informed the Court in its reply brief (See Appendix C) as well as during oral argument that the decision of the Supreme Court of Texas had been overruled by the Supreme Court of the United States in Orozco v. Texas, 89 S.Ct. 1095.

It is now fundamental to the criminal law that all questioning of a defendant who is in custody or otherwise deprived of his freedom of action in any significant way must be prefaced by the appropriate warnings stated in Miranda v. Arizona, 384 U.S. 436 (1966). In the petitioner's case the police admit that no such warning was given, and the reviewing Court makes note of this in the affirming decision. (See Appendix A, p. 6, line 5 and 6.)

The original trial court held that all statements made "at the scene", which was the petitioner's apartment, were inadmissible because the petitioner was under arrest at that time and no constitutional warnings had been given. The court, however, distinguished between the first statement made by the petitioner, "Is it about the boy I had up here?" and the petitioner's subsequent answers to interrogations on the basis that the first statement or question was voluntarily given.

However, before a voluntary statement can be used the burden is

on the State to establish that in fact the petitioner already had full knowledge of his rights; that he understood that an attempt to exercise them would not be thwarted or paralyzed; and that with such knowledge he acted voluntarily. In the petitioner's instant case there was no knowledge shown as to constitutional rights. The arresting officers refused to allow the petitioner to use the telephone in his own apartment to call his family. (See Appendix A, p. 5, line 6, 7, and 8.)

We have the situation where uniformed police officers, without a warrant or complaint, enter a man's apartment where he is relaxing in his pajamas and the time is after 8:30 P.M., and the police order the petitioner to get dressed and come with them to a local police station without the right to use his own telephone or to be informed of the standard constitutional warnings, and yet, what the petitioner said is taken to be voluntary. This Court in Escobedo v. Illinois, 378 U.S. 478, 487, used language which is most appropriately applicable to the situation present in this case. "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." Surely a man in his pajamas and surrounded by the comforts of his home feels safe in asking a question of uniformed intruders without process, to know why he is forced to change into clothes and be taken under arrest to a local police station, without the privilege of using his own telephone to call his family or counsel, without the question being interrupted and visited with a label of self-incrimination and being then admitted against him.

The Appellate Court of Illinois, First Judicial District, rejects the petitioner's claim that Crocco v. Texas, 394 U.S. 324 is the controlable case and the Appellate Court declares it to be inapposite on facts:

> "In Crocco v. Texas, 394 U.S. 324, the officers questioned the defendant not only as to his name, but also whether he had been at the place where the shooting in question occurred, whether he owned a gun, and where the gun was located; defendant there gave incriminating answers to each of the questions asked. Defendant there had been under arrest and was not advised of his constitutional rights, and the Supreme

> Court stated, at page 326 of the opinion, that the police had "questioned petitioner about incriminating facts" before advising him of his rights. Such is clearly not the situation here."
>
> (Appendix A, page 8, emphasis petitioner.

And the State uses Orozco v. Texas, 428 S.W.2d 666 (1967), as support for its argument, stating:

> "However, while the same issue was apparently raised there as in this court, th holding is conclusively in support of the State's position and concurs with In re Orr. The result is that the statement made by the defendant in this case was correctly admitted into evidence by the trial judge."
>
> (Aprendix B.)

In the instant case the statement admitted over the objection of the counsel for the defense was highly prejudicial to the petitioner and the conviction by the circuit court should have been reversed by the appellate review. The trial court ruled on the essential issue of corroboration of the testimony of the prosecuting witness (a 13-year-old-boy) to the effect that his testimony was substantially corroborated by the testimony of the petitioner relating to two matters: namely, that the petitioner took the prosecuting witness for a car ride, and then took him to his apartment. Without the admission of the statement of the petitioner, to-wit: "Is it about the boy I had up here?" -- the case could have and should have been dismissed. Except for the admission of that statement, the petitioner could have and would have remained silent and could have and would have demanded the State to corroborate the testimony of the 13-year-old complaining witness that he was in the apartment of the petitioner at the time and place in question when the boy was 'skipping school'. For, did the incident occur as the boy stated or was it a tool to save him from punishment for 'skipping school'?

But there is no basis in the law to admit a voluntary incriminating statement made after arrest when no constitutional warnings have been given prior thereto. The Appellate Court of Illinois accepted the decision of Orozco v. Texas, 428 S.W.2d 666, while rejecting the overruling opinion of Orozco v. Texas, 89 S.Ct. 1095, 394 U.S. 324. This conflict justify the granting of certiorari to review the judgment below.

2) WHETHER APPELLATE COURT OF ILLINOIS HAS OVERRULED THE SUPREME COURT OF THE UNTIED STATES DECISION IN MIRANDA v. ARIZONA, 384 U.S. 436.

The Appellate Court of Illinois, First District, stated in it affirming opinion of the petitioner's conviction that:

> "Being a voluntary utterance, the statement (petitioner's) is not one which falls within the applicability of Miranda v. Arizona, 384 U.S. 436."

(See Appendix A, p. 7)

The Appellate Court of Illinois goes on to state:

> "As stated in the case of In re Orr, 38 Ill.2d 417, at 423: "All agree that Miranda does not require police to interrupt a suspect in the process of making a spontaneous statement in order to warn him of his constitutional rights, and that a statement made in the absence of any questioning is not inadmissible by virtue of the failure to give such warning. (Citing cases.)"

(See Appendix A, p. 7)

The caseof In re Orr, 38 Ill.2d 417, should have been distinguished by the Appellate Court of Illinois from the instant case because no questioning preceeded the statements of the defendant in that case. Orr was in custody being taken to the police station by two officers. He then gave a statement which was not preceded by an interrogation, stating that he wanted to get it off his chest. There were no warnings give prior to the incriminating statement.

If In re Orr is not distinguished, then In re Orr should be superseded by the decision of the United States Supreme Court in Orozco v. Texas, 89 S.Ct. 1095, 394 U.S. 324.

Moreover, the Appellate Court of Illinois has misapplied the word "voluntary" as applied to the incriminating statement made by the petitioner. The Court said the defendant "was not under arrest at the time the statement was made and . . . that the statement was voluntarily made, without prompting or solicitation on the part of the officers." Yet has the Appellate Court of Illinois taken into proper consideration that the petitioner was orderedto change from his pajamas to street wear by uniformed police officer who, without a warrant or complaint, refused to

allow the petitioner to use his own telephone (See Appendix A, pp. 5, 6) to call his wife, who was away, or any other member of his family or counsel. If the petitioner was not under arrest what gave the officers the right to so direct and order the petitioner about in his own home.

Petitioner submits that the prejudicial statement should not have been admitted for the failure to give the warnings required by Miranda v. Arizona, supra, and which was enlarged in Orozco v. Texas, 22 Law Ed. 2d, 311, 89 S.Ct. p. 1095. In that case, the defendant left the scene of the shooting and returned to his boarding house to sleep. At about 4:00 A.M., four police officers arrived at the premises and enter the bedroom. They failed to give warnings required by Miranda v. Arizona, supra, and "asked the defendant's name, whether he had been to the cafe, whether he owned a pistol, and where it was located." (Orozco, p. 311). Defendant gave incriminating answers to these questions and the State Court case was reversed, due to the failure to give appropriate warnings.

In the case at bar, the uniformed policemen entered the premises of the petitioner, without process or warrant, and ordered the petitioner to come to the station and asked him if that was his car outside, as well as his name, at that point the petitioner made an incriminating statement while in the process of changing from his pajamas to street wear. The petitioner was obviously under arrest and being forced to leave his home.

In Miranda, the statement is made that the police are not required to stop a person from walking into a police station and making a spontaneous confession. However, this is not the situation in the instant case.

The Appellate Court of Illinois states that it is for the trial court alone to resolve the conflict of evidence as to whether or not there was an arrest at the apartment of the petitioner (See Appendix A, p. 7) but then the Appellate Court, contrary to the finding of the trial court weighs the evidence and rules there was no custody in the petitioner's apartment.

If there was no custody, why then was the petitioner not permitted the use of his telephone within the apartment, and what made it necessary for the petitioner to change from his pajamas to street wear. And the issue is whether the Appellate Court of Illinois has overruled the decision of Miranda v. Arizona, 384 U.S. 436, with regards to the constitutional guarantees and protections afforded the petitioner herein by excluding that petitioner from the protection and due process upheld in that decision.

The conflict of the decision justifies granting of certiorari to the judgment entered below.

3) WHETHER APPELLATE COURT OF ILLINOIS IMPROPERLY PERMITTED AN INCRIMINATING STATEMENT BY THE PETITIONER TO STAND WHEN SAID STATEMENT WAS MADE AFTER ARREST AND WITHOUT PRIOR CONSTITUTIONAL WARNINGS.

The trial court held that all statements made "at the scene" of the petitioner's apartment were inadmissible because the defendant was under arrest at that time and no constitutional warnings had been given. However, the Appellate Court of Illinois rules (See Appendix A, p. 7):

> "The defendant was not under arrest at the time the statement was made, the statement was made voluntarily and was not prompted by any police questioning. The questions asked by the officers related solely to defendant's identity and whether defendant would accompany them to the police station."

It is not only unreasonable to believe that a man clothed in his pajamas and relaxing in the comforts of his home would accept an invitation to accompany two uniformed officers, without a warrant, to a police station while being denied the use of his own apartment telephone or explanation of why his presence at the station was required -- it is ridiculous to believe a man would do so. The petitioner was obviously under arrest, denied the warnings of his constitutional rights, deprived of the use of his own home telephone for aid or assistance of counsel or family, and the one statement he makes is judged incriminating and used against him: "Is that about the boy I had up here?"

Once the prosecution called the police officer to the witness stand and the statement was brought out the petitioner no longer could remain silent in his defense. Except for the admission of that statement the petitioner could have and would have remained silent and could have and would have demanded the State to corroborate the testimony of the 13-year-old complaining witness that he was in the apartment of the petitioner at the time and place in question.

The time was of material importance in this case as the testimony of the boy indicated that the transaction took between one hour and fifty minutes to over two hours.

The boy first testified that he had not ditched school; later admitted he did not go to afternoon classes after attending morning classes.

The boy first denied seeing any women, then admitted that he did see or discuss the fact that two or three women in front of the restaurant where he and the petitioner met were his teachers.

The boy first denied and then later admitted that he was selling the petitioner school tickets that were priced at 25¢ for $1 each.

The boy's testimony relative to drinking in the apartment changed materially depending on who was asking the question.

The boy testified that the petitioner allowed him to come up to his apartment where they watched the World Series on color television. While there the boy alleges the petitioner summoned him to the couch, unbuttoned and removed the boy's shirt, several times placed the mixed drink glass to the boy's lips for him to drink, and fondled the boy's penis for several minutes. The boy further alleges that when the petitioner asked if he liked that he answered in the negative and stated that he wished to go home. The boy then states the petitioner immediately drove him back to the restaurant where the boy had left his bicycle.

Later that day when the boy's mother discovered he had 'skipped school' then the boy told what happened or he alleged to have happened.

The only form of corroboration the State had to the petitioner and the boy being together was the petitioner's own testimony made in defense of the statement: "Is that about the boy I had up here?" But did the petitioner mean: up here to watch the ball game? up here cutting school? up here to commit a crime?

Without a warning as to the nature of the charges or reason why the police were dragging him out of his pajamas and home at night violated the petitioner's constitutional guarantees and resulted in his conviction.

The Appellate Court of Illinois improperly found that the petitioner was not under arrest and therefore not covered by the Miranda warnings. The conflict between decisions of this Court and the holding of the Appellate Court of Illinois, First Judicial District, justify the granting of certiorari to the judgment below.

CONCLUSION

For the above and foregoing reasons, a writ of certiorari ought to issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this case.

Respectfully submitted,

Luther Roy

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Joliet, Illinois 60434

Petitioner pro se.

I N D E X

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CITATIONS OF AUTHORITES

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APPENDIX A

53419

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
LUTHER ROY, Defendant-Appellant.	)	HON. JACQUES F. HEILINGOETTER, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of indecent liberties with a child and sentenced to a term of four years to five years in the penitentiary. He appeals. Defendant's motion made during oral argument to waive the filing of an abstract or excerpts of record was allowed.

Michael Veradi testified that on October 5, 1967 he was thirteen years of age and attended junior high school in Harvey, Illinois. He testified that he attended classes in the morning on that day, and that he ate lunch at noon at the De Mars Restaurant in Harvey. As Michael was paying his bill about 12:30 P.M., he noticed defendant standing behind him, and as he walked out of the restaurant, defendant followed.

Outside the restaurant Michael asked the defendant to purchase some tickets for a function being held by his school. He testified that defendant stated that he had no money with him, but suggested that the boy accompany him to his apartment where he would get some money. Michael testified that defendant then told him that he could make two dollars if he stayed with him until 1:00 P.M. Michael agreed and the two drove off in defendant's automobile.

Michael testified that defendant told him that he had an appointment in Chicago Heights, and that he and defendant drove in that direction for that reason. After a 45 to 60 minute ride, the pair stopped at a tavern where defendant consumed an alcoholic drink and Michael a soft drink. The pair then returned in

defendant's automobile to defendant's apartment, the latter trip taking 25 to 30 minutes.

Michael testified that in the apartment, he seated himself on a chair near the television which was switched on by the defendant. Defendant then mixed an alcoholic drink and seated himself on the couch. Michael testified that defendant summoned him to the couch, unbuttoned and removed his (Michael's) shirt, several times placed the mixed drink glass to his (Michael's) lips for him to drink, and fondled his (Michael's) penis for several minutes. Defendant asked Michael if he "liked it;" Michael answered in the negative and stated that he wished to go home. While driving back to the De Mars Restaurant where Michael had earlier left his bicycle, defendant asked him if he wished to return to the apartment and the boy replied in the negative. They arrived at the restaurant about 2:30 P.M.

When Michael arrived home he received telephone calls from his sister and from his mother. Later that day Michael and his mother and father went to the vicinity of defendant's apartment and noted the license plate number of defendant's automobile parked in front of the apartment. The three then drove to the Harvey Police Station.

Harvey Police Officer Howard Farning testified that at approximately 8:55 P.M. on this day, he and his partner, Officer Hunt, went to defendant's apartment and knocked on the door; defendant, clad in his pajamas, opened the door. The officer testified that he asked the defendant if his name was Luther Roy and if he owned the automobile parked outside. Defendant responded in the affirmative to both questions and the officer then asked him "if he would come down to the Harvey Police Station with us, we would like to talk to him." The defendant consented, and upon going to change his clothing, he asked the officers,

"Is that about the boy I had up here?" Defendant was then transported to the Harvey Police Station.

Defendant, testifying in his own behalf, stated that he met Michael Veradi in the De Mare Restaurant on the afternoon in question and that the boy asked him for a quarter. Defendant said, "No," whereupon the boy asked him to purchase tickets to his school's function. Defendant again declined and told Michael that he had to drive to Chicago Heights to keep an appointment. He testified that the boy then asked if he could accompany defendant for the ride. Defendant declined, stating that Michael had to return to school that afternoon, but Michael said that classes had been canceled because of a teacher's meeting that afternoon. Defendant testified that after some further insistence by the boy, he agreed to take him for a ride to Chicago Heights.

Defendant testified that during the ride, the pair talked about baseball, and that Michael later stated that he was hungry and also stated that he was skipping school that afternoon. Defendant told him that there was no place in the area to eat, and that he should either go back to school or go home. He testified that Michael asked him if he had a color television set at home, which defendant stated he did. Michael then asked if he could watch a World Series baseball game on the set, and defendant declined. The pair got into a heated exchange of words, and defendant suggested that they stop for something to drink. On their return trip to Harvey, Michael continued to insist that he be allowed to watch the baseball game on defendant's color television. Defendant testified that he finally consented to the boy watching a half inning of the game.

In the apartment, Michael seated himself in a chair near the television and defendant switched on the set. Defendant mixed himself an alcoholic drink, and sat in the kitchen with the drink until he heard that a half inning of the game was over. He testified that he then walked over to the television, switched it off, and told Michael, "That is all, Mike, let's go."

Defendant testified that Michael again asked if defendant would purchase tickets from him, that he again refused, and that the pair left the apartment. Defendant testified that the time spent in the apartment was exactly five and one-half minutes, and that they left the apartment at 12:53 P.M. Defendant further testified that he drove the boy back to the De Mars Restaurant, arriving there at 12:55 P.M. Defendant then drove to his wife's place of employment.

Defendant denied touching or in any manner fondling Michael Veradi, and further denied forcing him to accept the alcoholic drink in the apartment.

The record also revels that Michael denied knowing the defendant prior to the incident; defendant, on the other hand, testified that he knew Michael by sight because Michael used to play with some boys who lived next door to the defendant, and that defendant would on occasion say hello to and speak with the boys.

Defendant filed a pre-trial motion to suppress certain statements allegedly made by him on the day of the incident, among which was the statement made in the apartment to the police officers, testified to by Officer Farning. At the hearing on the motion defendant testified that shortly before 9:00 P.M. on the day in question, two uniformed police officers from the City of Harvey Police Department came to his apartment and inquired of him whether he had taken a boy for a ride in his automobile.

Defendant replied in the affirmative, and the officers thereupon asked him to accompany them to the police station. Defendant testified that the officers stated that no complaint had been filed against him, but that they would not tell him why there was any possibility of a complaint being filed against him when he inquired. Defendant testified that he asked to telephone his wife, who was at a meeting, but the officers refused and said that he could be taken care of later.

Defendant testified that he accompanied the officers to the police station. He stated that he was asked what he had to say about the matter, and that he replied that there was nothing to say, because he merely gave a boy a ride in his automobile. He testified that he asked to be allowed to contact his family so they could contact an attorney, but was unable to contact his family until shortly before 11:00 P.M. that evening.

Defendant testified on cross-examination that he spoke to the Veradi boy's mother at the station between 10:15 and 10:30 P.M. and that he denied to her that he took indecent liberties with her son.

Officer Farning testified on behalf of the People at the hearing on the motion. He related that on the evening in question he and Officer Hunt were assigned to investigate a report of a charge of indecent liberties. The two officers went to the defendant's apartment, knocked on the door and asked defendant if he was Luther Roy, to which he replied, "Yes." Officer Farning then asked him if he would go with the officers to the police station because they would like to talk to him.

The officer testified that defendant stated that he was willing to go with the officers and that as he was changing his clothes, the defendant asked the officers, "Is this about the boy that was up here?" Officer Farning stated that he responded,

stating, "What boy?" and that the defendant replied, "The one I had in the car." The officer testified that defendant then told him that he picked the boy up at a restaurant in Harvey, took him for a ride, brought him up to his apartment, and took him back to the restaurant. The officer finally testified that defendant was given no constitutional warnings because he had made the statements before they arrived at the station.

On cross-examination the officer testified that when he and his partner first entered the defendant's apartment, he did not ask the defendant whether he had taken the boy for a ride, nor did he tell the defendant at that time that the officers had received an oral complaint from a woman, but that no formal complaint had then been made against him. The officer also testified that he asked defendant no questions other than those asked initially upon the officers entering the apartment.

Mary Veradi, Michael's mother, testified that she had a conversation with defendant at the police station on the night in question, but the trial court sustained an objection to her testifying as to the content of that conversation. Officer Hunt was also called by the People; his testimony was substantially the same as that given by Officer Farning.

The trial court suppressed all statements made by the defendant except the one made when the officers first entered the apartment, which was testified to by Officer Farning at trial.

Defendant first maintains that the trial court committed error in admitting the statement testified to by Officer Farning into evidence, inasmuch as it was made after he was placed under arrest and without prior constitutional warnings. We disagree.

The evidence introduced at the hearing on the motion to suppress by the People and by the defendant was somewhat

in conflict, the resolution of which was for the trial judge. Under the People's evidence, the circumstances surrounding the making of the statement clearly shows that the defendant was not under arrest at the time the statement was made and further shows that the statement was voluntarily made, without prompting or solicitation on the part of the officers. Being a voluntary utterance, the statement is not one which falls within the applicability of Miranda v. Arizona, 384 U.S. 436.

As stated in the case of In re Orr, 38 Ill. 2d 417, at 423:

> "All agree that Miranda does not require police to interrupt a suspect in the process of making a spontaneous statement in order to warn him of his constitutional rights, and that a statement made in the absence of any questioning is not inadmissible by virtue of the failure to give such warning. (Citing cases.)"

In the Orr case, a statement made by the defendant, who was under arrest at the time but who had received no constitutional warnings, was held admissible, inasmuch as it was voluntarily made and was not the result of questioning by the authorities.

The officers in the instant case merely knocked on the door to defendant's apartment, asked defendant if he was Luther Roy, and asked him if he owned the automobile parked outside. Defendant responded in the affirmative to both questions, and also consented to going with the officers to the police station. While defendant was in the process of changing his clothes, he asked the officers if the matter concerned the boy he was with earlier that day. The defendant was not under arrest at the time the statement was made, the statement was made voluntarily and was not prompted by any police questioning. The questions asked by the officers related solely to defendant's identity and to whether defendant would accompany them to the police station.

The only difficulty which arises with regard to the statement is as to its content, and consequently as to its weight:

whether the statement related to the boy's presence only in the automobile, as testified to by defendant, or whether it related to the boy's presence in the apartment, as testified to by the officer. This again was a matter for resolution by the trier of fact.

The cases cited by defendant are inapposite on their facts. In Oroczo v. Texas, 394 U.S. 324, the officers questioned the defendant not only as to his name, but also whether he had been at the place where the shooting in question occurred, whether he owned a gun, and where the gun was located; defendant there gave incriminating answers to each of the questions asked. Defendant there had been under arrest and was not advised of his constitutional rights, and the Supreme Court stated, at page 326 of the opinion, that the police had "questioned petitioner about incriminating facts" before advising him of his rights. Such is clearly not the situation here.

In United States v. Appell, 259 F. Supp. 156, and in Gray v. United States, 394 F. 2d 96, defendants gave their statements voluntarily and at a time when they were not under arrest, as is the situation here.

Defendant next contends that the People failed to prove that the defendant was of the age of seventeen years or upwards.

It is necessary, as an element in the chain of proof in a case of this nature, that the age of both the victim and the accused be proven by substantial evidence. People v. Rogers, 415 Ill. 343.

In the instant case, Officer Farning testified that he knew defendant's exact age to be forty, and later related it to be "in the forties," based upon his observations of the defendant in the courtroom. An objection to that testimony was overruled and

the officer's opinion in this regard was allowed to stand. This was error.

However, that error was cured by later questioning of the same witness about an opinion as to whether the defendant was seventeen years of age or upwards; the witness answered in the affirmative and testified that defendant was seventeen years of age or upwards. No objection was made to this testimony, and in the absence of a specific objection, the testimony of the witness will be allowed to stand. People v. Davis, 10 Ill. 2d 430; People v. Claussen, 367 Ill. 430. Finally, defendant himself testified that he was forty years of age.

The final two points raised by the defendant essentially challenge the sufficiency of the evidence for the People. We are of the opinion that the People presented evidence of a clear and convincing nature from which the jury had a right to find the defendant guilty beyond a reasonable doubt of the crime of indecent liberties with the child.

The account given by Michael Veradi of the two hour period spent in the defendant's presence was unshaken on cross-examination. The boy made immediate complaint to his parents, as is evidenced by the short length of time elapsed between the incident and the custody of the defendant. The police officer's testimony concerning the statement made to the officers in the apartment is clearly against defendant's interest in this regard, as is his admission at trial that he, a man in his forties, permitted a boy of thirteen to come to the apartment on the afternoon in question, allegedly to watch the baseball game on color television.

The credibility of the witnesses and the weight to be given to their testimony is a matter for the trial judge, where a jury

has been waived. People v. Arnold, 2 Ill. 2d 92. The evidence of one witness, where credible and the evidence clear, is sufficient to sustain a conviction, even though the evidence is contradicted by the accused. People v. O'Connell, 76 Ill. App. 2d 389.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McCORMICK, P.J., and LYONS, J., concur.

APPENDIX B

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LUTHER ROY, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Illinois, First Municipal District — Honorable Jacques F. Heilingoetter, Judge Presiding

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE.

ISSUES PRESENTED

I.

Whether a voluntary incriminating statement made after arrest without prior constitutional warning was admissible into evidence.

II.

Whether the State established the defendant's age to be upwards of 17.

III. and IV.

Whether the evidence proved the defendant guilty beyond a reasonable doubt.

POINTS AND AUTHORITIES

I.

AN INCRIMINATING REMARK OF THE DEFENDANT MADE TO POLICE OFFICERS AFTER HIS ARREST IS ADMISSIBLE INTO EVIDENCE ALTHOUGH NO CONSTITUTIONAL WARNINGS WERE GIVEN, SINCE THE STATEMENT WAS OFFERED FREELY, VOLUNTARILY, UNDER NO COMPELLING INFLUENCE OF THE POLICEMEN, AND WHERE THERE WAS NO CUSTODIAL INTERROGATION.

Miranda v. Arizona, 384 U.S. 436 (1966);

In re Ott, 38 Ill. 2d 417;

Orozco v. Texas, 428 S.W. 2d 666 (1967);

People v. Jones, 52 Cal. Reptr. 924 (p.c. of App. 1966);

Bailey v. People, 419 P. 2d 446 (Colo. 1966);

U.S. v. Cruz, 265 F. Supp. 15
(W.D. Tex. 1967).

II;

THE DEFENDANT WAIVED HIS RIGHT TO COMPLAIN AS TO EVIDENCE ELICITED BY A POLICE OFFICER CONCERNING THE DEFENDANT'S AGE; AND, THE STATE ESTABLISHED THE DEFENDANT'S AGE TO BE UPWARDS OF 17.

People v. Washington, 23 Ill. 2d 546;

People v. Merrill, 76 Ill. App. 2d 82;

People v. Davis, 10 Ill. 2d 430, Cert. denied
355 U.S. 820;

People v. Rogers, 415 Ill. 343;

People v. Slaughter, 29 Ill. 2d 384;

People v. Curtis, 90 Ill. App. 2d 231;

People v. Lacey, 49 Ill. App. 2d 301;

People v. Kielczewski, 269 Ill. 299;

Seaverns v. Lischinski, 181 Ill. 358;

III. and IV.

THE EVIDENCE PROVED THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT SINCE THE TESTIMONY OF THE COMPLAINING WITNESS WAS CORROBORATED AS TO ALL POINTS OTHER THEN THE ACT OF INDECENT LIBERTIES ITSELF, NEVERTHELESS, THE BOY'S TESTIMONY WAS CLEAR AND CONVINCING.

People v. Richardson, 17 Ill. 2d 253;

People v. Gunbusy, 402 Ill. 74;

People v. Walker, 13 Ill. 2d 334;

People v. Finn, 12 Ill. 2d 76;

People v. O'Connell, 76 Ill. App. 2d 389;

People v. Haiteman, 10 Ill. 2d 74;

People v. Dorsey, 57 Ill. App. 2d 389;

People v. Martichuic, 361 Ill. 178.

ARGUMENT.

I.

AN INCRIMINATING REMARK OF THE DEFENDANT MADE TO POLICE OFFICERS AFTER HIS ARREST IS ADMISSIBLE INTO EVIDENCE ALTHOUGH NO CONSTITUTIONAL WARNINGS WERE GIVEN, SINCE THE STATEMENT WAS OFFERED FREELY, VOLUNTARILY, UNDER NO COMPELLING INFLUENCE OF THE POLICEMEN, AND WHERE THERE WAS NO CUSTODIAL INTERROGATION.

It is now fundamental to the criminal law that all questioning of a defendant who is in custody or otherwise deprived of his freedom of action in any significant way must be prefaced by the appropriate warnings stated in Miranda v. Arizona, 384 U.S. 436 (1966). Equally as basic is the rule of law that "volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility". . ." is not to be restrained (Miranda v. Arizona, 384 U.S. 436, 479. The Court in Miranda states at p. 479, "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." The statement of the Court is crystal clear, as the Fifth Amendment guarantees certainly do not preclude admission of volunteered statements.

There is nothing either expressly stated or implied in Miranda that would forbid the admissions of the statement made under the circumstances of the present case. In this instance two police officers went to the defendant's apartment, knocked and the defendant opened the door. The defendant was asked if he owned the car downstairs and if he was Luther Roy; the answer was yes. The defendant was asked if he would come down to the Harvey police station as they (the police) would like to talk to him. Roy retorted, "All right", and went to change his clothes, whereupon Roy said, "Is that about the boy I had up here?" (Rep. of Pro. 106). There is nothing which demonstrates that the statement was not made freely, voluntarily and under no coercive influences. Further, it is clearly indicated that there was no interrogation. Thus, there is nothing that precludes admission of the statement.

The defendant argues that there is no basis in the law to admit a voluntary incriminating statement made after arrest when no constitutional warnings have been given. The attorneys for the appellant state further that they have not found any case in which a voluntary, incriminating statement made after arrest without appropriate warnings was admitted. Well, the opinion in Miranda relating to the admissibility of voluntary statements provides an excellent basis to admit into evidence the statement involved in this case; and, if that be deemed insufficient, the attorneys for the People have found cases in which a voluntary incriminating statement made after arrest without prior warnings was admitted. In re Orr, 38 Ill. 2d 417; People v. Jones, 52 Cal. Reptr. 924 (D.C. of App. 1966); Bailey v. People, 419 P. 446 (Colo. 1966); United States v. Cruz, 265 F. Supp. 15 (W.D. Tex. 1967); The Illinois Supreme Court in In re Orr, 38 Ill.2d 417, 422-424, was faced with the same question raised here. Orr was in custody being taken to the police station by two officers. He then gave a statement which was not preceded by an interrogation, stating that he wanted to get it off his chest. There was no warning given prior to the incriminating statement. The statement was admissible as the circumstances were not violative of Miranda.

It is to be noted that counsel for the appellant cites Orozco v. Texas, 428 S.W. 2d 666 (1967), as support for its argument. However, while the same issue was apparently raised there as in this court, the holding is conclusively in support of the State's position and concurs with In re Orr. The result is that the statement made by the defendant in this case was correctly admitted into evidence by the trial judge.

II.

THE DEFENDANT WAIVED HIS RIGHT TO COMPLAIN AS TO EVIDENCE ELICITED BY A POLICE OFFICER CONCERNING THE DEFENDANT'S AGE; AND, THE STATE ESTABLISHED THE DEFENDANT'S AGE TO BE UPWARDS OF 17.

The defendant here was over 40 years old. This conclusion is based not only upon the testimony of the police officer, but upon the testimony

of the defendant himself. The police officer stated that he knew the defendant's exact age to be 40 years old and then stated that in his opinion, based upon his experience and observations of the defendant, the defendant was in his early 40's. To this testimony the defense counsel objected. Subsequently, the police officer stated that based upon his experience as a police officer and his observations of the defendant, the defendant was of the age of 17 years and upwards. However, counsel for the defense did not specifically object to this.

The law is certain that a police officer may give his opinion of a defendant's age based upon his experience where the officer has had an opportunity to observe the defendant. People v. Rogers, 415 Ill. 343. Since the officer arrested the defendant and saw him in the courtroom there was sufficient opportunity to observe. Counsel for the defendant contends that the witness must first describe the appearance of the individual. The defendant relies on People v. Kielczewski, 269 Ill. 299, for the rule that there must be a description of the defendant by the officer testifying. But that case as other cases which state that rule have been tried by a jury and not by a judge as in this case.

In People v. Rogers, 415 Ill. 343, the court seems to state that the reason for the requirement of description is to allow for inspection by a court of review and "to allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust." Such a danger is not present in this case since the judge was the trier of all issues. The judge is certainly able to make appropriate observations as to the physical appearance of the defendant. Thus, the judge can assess the credibility of the officer's opinion by perusal of the defendant in the courtroom. Also, a reviewing court can adequately inspect the record on this issue. There was proper qualification of the witness as a police officer; there was plenty of opportunity to observe; the trial court judge found the defendant to be over 17; and, the defendant, by his own testimony, stated that he was forty.

If such a description is further demanded, case law reveals that in a prosecution for indecent liberties, unless there is specific objection, the opinion will be sufficient evidence, People v. Davis, 10 Ill.2d 430, 441, Cert. denied 355 U.S. 820. In Davis, the court states at p. 441:

> "In the absence of specific objection, it was proper to permit this witness to give his opinion to defendant's age."

There the sheriff testified that the defendant appeared to be 28 years old. In the instant case there was objection as to the opinion of the officer relating the defendant to be 40 years old. However, there was no objection when the officer testified that the defendant was upwards of 17 years of age.

In the Davis case, where the court held the age of the defendant to be clearly indicated, the mother of the defendant testified on the defendant's behalf and stated the defendant's age to be 28. In the instant case the defendant, called as a witness in his own behalf, testified that he was forty (Rep. of Pro. 174). Consequently, record here clearly demonstrates the age of the defendant to be over 17 as was found by the trial court and should be affirmed by the reviewing court.

Notwithstanding all that has been mentioned, case law reveals that the defendant by putting on evidence at the close of the State's case waived any alleged error in the trial court judge's refusal to grant the defendant's motion for dismissal. People v. Washington, 23 Ill.2d 546, 548; People v. Slaughter, 29 Ill.2d 384, 389; People v. Curtis, 90 Ill.App.2d 231, 232; People v. Merrill, 76 Ill.App.2d 82, 86; People v. Lacey, 49 Ill.App.2d 301, 305. In Merrill, 76 Ill.App.2d 82, the defendant was convicted of burglary. The court stated at p. 85 that the corporate existence of the entity burglarized was essential to the State's case. Objections were made by the defendant to the testimony regarding the existence of the corporate entity. A motion for a directed verdict was denied when made by the defendant at the end of the State's case. The defendant chose to proceed and offered evidence which established the fact of the corporate existence of the place burglarized. It

was held that the defendant waived any error by proceeding with his case. In the instant case the defendant alleged error in his motion to dismiss which was denied. Subsequently, the fact of the defendant's age was established on cross-examination of the defendant. Consequently, the defendant cannot complain since the fact of the defendant being over 17 years of age was established.

III. and IV.

THE EVIDENCE PROVED THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT SINCE THE TESTIMONY OF THE COMPLAINING WITNESS WAS CORROBORATED AS TO ALL POINTS OTHER THAN THE ACT OF INDECENT LIBERTIES IT-SELF. NEVERTHELESS, THE BOY'S TESTIMONY WAS CLEAR AND CONVINCING.

The State responds to appellant's Points III & IV in one argument since both points essentially controvert the sufficiency of the evidence.

In this case the right to a jury trial was waived. As such the credibility of witnesses, the weight to be given their testimony and inferences to be drawn therefrom are for the trial judge. People v. Richardson, 17 Ill.2d 253, 257. Consequently, the conviction should not be disturbed except to prevent apparent injustice. People v. Richardson, 17 Ill.2d 253, 257.

That the law requires clear and convincing evidence or corroboration to support the conviction is adequately stated by the appellant's brief. Allusion to the evidence reveals that the evidence was not only clear and convincing but corroborated; thus the State met its burden. It is the testimony of both the complaining witness and the defendant that on the day in question Roy and the boy went for a ride. It is uncontradicted that while driving the defendant stopped at a tavern and treated the boy to a coke. In People v. Gambuoy, 402 Ill. 74, 79, the court indicated that that taking a child for a ride and entertaining in his apartment was evidence of his unusual interest and gives rise to the inference that the interest was other than platonic. Moreover, in People v. Smith, 55 Ill. App.2d 480, 487, the only corroboration was an apparent interest in kids (this case was reversed on other grounds.).

It must be concluded that the car ride casts, at the very least, suspicion as to the actions and the motives of the defendant.

In fact, the only consequential disparity between the testimony of the youth and the defendant was as to the actual taking of the indecent liberties. The appellant argues that being in an apartment alone cannot corroborate acts of indecent liberties, and that the crime must be proved. However, as was the case, and so stated by the court in People v. Walker, 13 Ill.2d 334, 338, the corroborating evidence need not be as to the actual taking of the indecent liberties. In addition, even without corroboration it does not necessarily follow that the conviction will be set aside. People v. Finn, 12 Ill.2d 76, 77. For evidence of one credible witness is sufficient to convict even though the testimony is contradicted by the accused. People v. O'Connell, 76 Ill.App.2d 389, 395.

The boy's testimony was undiscredited as to the acts in issue. It was clear and unshaken on cross-examination, and nowhere in the record does his story vary. The boy went home and later that same day ostensibly told his mother what happened, whereupon the police were informed. That the youth complained the same day is probative as to the validity of his allegations.

Significant is the fact that the defendant admitted the presence of the boy in his apartment. When the police arrived the defendant stated, "Is that about the boy I had up here?" Although the statement does not admit guilt, the "statement of defendant tends to indicate some wrongdoing and is corroboration of highest quality and from a most reliable source." People v. Haltemann, 10 Ill.2d 74, 79. In Haltemann, the defendant stated at p. 78, "Don't be silly, what could happen in the time it takes to buy a bag of onions."

The discrepancies in the testimony which did occur as to the time were not that significant as testimony regarding the crucial facts were unequivocal. Even the defendant related discrepancies as to the time whereas he stated that it took 20 to 25 minutes to get to the Inn. (R. p. 151), yet he also testified that they arrived at the tavern about 12:30 - 12:35 P.M. (R. p. 166). This was inconsistent with other testimony regarding the time sequence.

The appellant states that Michael first said he didn't ditch school and later testified that he did. The boy meant that he went to school in the morning, but did not return in the afternoon.

The appellant challenges the boy's testimony as to the selling price of the tickets. The characterization is inaccurate as the boy clearly stated that he did not know what the $2.00 was for, except to stay with the defendant for about a half hour. Moreover, the boy's testimony regarding the drinking in the apartment was not changed. Minor discrepancies are undeniably sufficient to sustain a conviction. People v. Dorsey, 57 Ill.App.2d 389, 395.

In the last analysis, it is the testimony of the boy and the defendant as to the occurrences at the apartment which conflict. But, the court should not substitute its judgment for that of the trial court when evidence is merely conflicting. People v. Martishuis, 361 Ill. 178. The crime was established by clear, convincing and corroborated testimony.

CONCLUSION

The People of the State of Illinois respectfully request that the conviction of Luther Roy be affirmed.

APPENDIX C

NO. 53419

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LUTHER ROY, Defendant-Appellant.	Appeal from Circuit Court of Cook County, Illinois, First Municipal District. — Honorable Jacques F. Heilingoetter, Judge Presiding.

REPLY BRIEF FOR

DEFENDANT - APPELLANT.

REPLY

I.

THE COURT ERRED IN ADMITTING THE INCRIMINATING STATEMENT OF DEFENDANT MADE AFTER ARREST WITHOUT PRIOR CONSTITUTIONAL WARNINGS.

The attorney for the People in this matter has cited Orozco vs. Texas, 428 S.W.2d, 666 (1967), and has stated that that case supports its arguments. As cited, the case is in support of their position but that case was ruled upon by the U.S. Supreme Court on March 25, 1969 in 22 Law Ed., 2d 311, 89 S.Ct. ____, and was reversed. In that case, the Defendant left the scene of the shooting and returned to his boarding house to sleep. At about 4:00 A.M., four police officers arrived at the premises and entered the bedroom. They failed to give warnings required by Miranda v. Arizona, and "asked the defendant name, whether he had been to the cafe, whether he owned a pistol, and where it was located." (Orozco, p. 311). Defendant gave incriminating answers to these questions and the

State Court case was reversed, due to the failure to give appropriate warnings.

In the case at bar, the policemen entered the premises of Luther Roy, and asked him to come to the station and asked him if that was his car outside. At that point, Luther Roy made an incriminating statement. We feel that this is the exact situation as asserted in the Orozco case. Furthermore, there were questions asked, even though only a few, by the policemen so there is no dispute that Luther Roy was subject to interrogation in his premises. The Orozco case, which amplified the Miranda case where there is an arrest in or at a person's abode, states this to be a compelling circumstance present which requires the application of the Miranda rule that warnings should be given.

The Appellee quotes Miranda and cites that statements given freely and voluntarily without any compelling influences are admissible. We would agree with that point but we believe that since there was an arrest and since there was questioning, there were compelling influences in the Luther Roy case and in the statement admitted by the Court was not "voluntarily" given in the sense the Appellee used the word "voluntarily". We distinguish the Roy case from the cases cited by the Appellee by the fact that Luther Roy's statement was given after an arrest and after there were questions asked by the police officers in circumstances as determined by Orozco where Miranda warnings must be given.

In Miranda, the statement is made that the police are not required to stop a person from walking into a police station and making a spontaneous confession. In such cases there have been no arrests and no prior questions and to reverse the conviction of Luther Roy the appellant is not contrary to the holding of Miranda.

The various cases cited by the prosecution in support of their arguments that Luther Roy's statement was voluntary and admissible can all be distinguished from the current case particularly in light of the Orozco case.

POINTS RELIED ON FOR REVERSAL

1. The Appellate Court states that it is for the trial court to resolve the conflict of evidence as to whether or not there was an arrest at the apartment of petitioner (App. dec p7) but then, contrary to the finding of the Circuit Court (Rep. of pro. p.46) weighs the evidence and says there was no custody at the apartment. This redefining of when there was custody obscured the constitutional issue raised in the Circuit Court decision which was whether or not the statement of defendant made after there was custody was admissible as a voluntary statement.

2. The State relied upon Orozco v. Texas, 428 S.W.2d 666 (1967) (brief of Appellee, p. 10) as support for its argument but admitted in oral argument that such case was overturned by the U.S. Supreme Court in 22 Law Ed. 2d 311, 89 S.Ct., p. 1095. The facts of the Orozco case as ruled on by the U.S. Supreme Court are very similar to those of the instant case and should have been the basis for a ruling in favor of the defendant-appellant.

3. The case of In re Orr, 38 Ill.2d 417, should have been distinguished by the appellate court from the instant case because no questioning preceeded the statements of the defendant in that case and there was serious questions as to whether or not there was an arrest in In re Orr. If In re Orr is not distinguishable, then In re Orr should be superceded by the decision of the U.S. Supreme Court in Orozco.

4. The Court misapplied the word "voluntary" as applied to the incriminating statement made by Luther Roy. The Court said the defendant "was not under arrest at the time the statement was made and... that the statement was voluntarily made, without prompting or solicitation on the part of the officers." We feel that an incriminating statement made after questioning and arrest, as in this case, is involuntary because of the compelling circumstances. Orozco expands the reach of Miranda to this type setting and indicates that the Court should have reversed the trial court.

FACTS

The Appellate Court correctly states that the officers asked the defendant questions about his name, whether or not he owned the automobile outside and whether he would come to the station with them. Petitioner points out that Luther Roy then made an incriminating statement "Is it about the boy I had up here?" which statement was highly prejudicial to defendant because it was corroborative of the testimony of the complaining witness and established a basis on which the trial court judge overruled defendant's motion for a directed verdict.

The mother of the complaining witness testified in the trial court that the automobile parked in front of the house was the automobile in which her son was taken for a ride. Further, the trial court stated, contrary to the assertion of the Appellate Court, that the defendant was in custody at the apartment.

ARGUMENT

The judgment of the trial court should be relied upon as to whether or not there was custody. The Appellate Court stated that the judgment of the trial court on this matter should be previal but disregards the trial court's decision on that matter. There should have been a ruling on whether or not the statement in question form "Is it about the boy I had up here" should have been admitted since no constitutional warnings were given.

We submit that this prejudicial statement should not have been admitted for the reasons stated in our trial brief and answer and most particularly due to the decision of Orozco v. Texas, 22 Law Ed.2d, 311, 89 S.C t. p. 1095. In that case, the defendant left the scene of the shooting and returned to his boarding house to sleep. At about 4:00 A.M., four police officers arrived at the premises and entered the bedroom. They failed to give warnings required by Miranda v. Arizona, and "asked the defendant's name, whether he had been to the cafe, whether he owned a pistol, and where it was located." (Orozco, p. 311). Defendant gave incriminating answers to these questions and the State Court case was reversed, due to the failure to give appropriate warnings.

In the case at bar, the policemen entered the premises of Luther Roy, and asked him to come to the station and asked him if that was his car outside. At that point, Luther Roy made an incriminating statement. We feel that this is the exact situation as asserted in the Orozco case. Furthermore, there were questions asked, even though only a few, by the policemen so there is no dispute that Luther Roy was subject to interrogation in his premises. The Orozco case, which amplified the Miranda case where there is an arrest in or at a person's abode, states this to be a compelling circumstance present which requires the application of the Miranda rule that warnings should be given.

The Appellee quotes Miranda and cites that statements given freely and voluntarily without any compelling influences are admissible. We would agree with that point but we believe that since there was an arrest and since there was questioning, there were compelling influences in the Luther Roy case and in the statement admitted by the Court was not "voluntarily" given in the sense the Appellee used the word "voluntarily". We distinguish the Roy case from the cases cited by the Appellee by the fact that Luther Roy's statement was given after an arrest and after there were questions asked by the police officers in circumstances as determined by Orozco where Miranda warnings must be given.

In Miranda, the statement is made that the police are not required to stop a person from walking into a police station and making a spontaneous confession. In such cases there have been no arrests and no prior questions and to reverse the conviction of Luther Roy, the appellant, is not contrary to the holding of Miranda.

WHEREFORE, petitioner prays for an order granting him leave to appeal, that this Court reverse the judgment below and remand the cause to the Appellate Court with directions to enter judgment for the petitioner.

RECORD OF PRESS

APPENDIX D

No.

IN THE

SUPREME COURT OF ILLINOIS

September Term, A.D. 1970

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee-Respondent,

vs.

LUTHER ROY,

Defendant-Appellant- Petitioner,

Appeal from the Appellate Court of Illinois
First District

PETITION FOR LEAVE TO APPEAL

IN THE

SUPREME COURT OF ILLINOIS

September Term, A.D. 1970

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee-Respondent,

vs.

LUTHER ROY,

Defendant-Appellant-Petitioner.

Appeal from the Appellate Court of Illinois
First District

PETITION FOR LEAVE TO APPEAL

LUTHER ROY, Defendant-Appellant-Petitioner, by Rayson and Hutchison, his attorneys, prays for an order granting him leave to appeal from the judgment order of the Illinois Appellate Court, First District, entered April 4, 1970, which affirmed the conviction of petitioner by the Circuit Court of Cook County at a bench trial of the crime of indecent liberties with a child and sentenced petitioner to a term of four to five years in the penitentiary;

And in support of his petition says:

(A)

The need for the exercise by this Court of its supervisory authority, petitioner submits, is manifest.

Unless overruled, the opinion below may stand as a rule of law for the forseeable future. Since petitioner believes that the rule of law as laid down below erroneously applies sound constitutional principles settled by decisions of this Court and decisions of the United States Supreme Court, he believes such perpetuation, however short-lived, would be unfortunate and unjust to other claimants and litigants.

No petition for rehearing has been filed nor is one contemplated.

In Bailey vs. People, 419 P. 2d 446 (Colo. 1966) there was no police questioning whatsoever which proceeded the incriminating statement. In People v. Jones, 52 Cal. Reptr. 924 (D.C. 1966), the defendant was found in an attic engaged in an apparent burglary. As the defendant came out of the opening in the attic, he said, "Man, am I glad you caught me, if I had kept on I was afraid somebody was going to shoot me." There were no proceeding questions put to him by the police, and as far as subsequent statements were concerned he had signed a waiver that he had been warned of his rights before he made those statements.

In U.S. v. Cruz, 265 Fed. Supp. 15 (1967), the court stated that the defendants' statement was "voluntary, spontaneous, and freely made prior to any attempted interrogation by arresting officers."

In In re Orr, 38 Ill. 2d 417, at p. 423, the court said that:

"No questioning proceeded statements of the Respondent."

In re Orr, an Illinois case, was decided without the guidelines of Orozco vs. Texas. Whether the In re Orr case would have been decided differently after the Orozco rule is problematical. But we do know that the Roy case can be distinguished from In re Orr, for the reason that the In re Orr holding is based upon the fact that there were no proceeding questions. There was also a serious question in the Orr case as to whether there was an arrest of the defendant at the time he made his statement.

The policemen in the Luther Roy case very easily could have warned Luther Roy of his Miranda rights when they asked him to come to the station and asked him questions about his car. They did not do so and the trial court erred in admitting the statement he made prior to the time he was given his warnings. This one admission by the trial court is crucial to this appeal. The trial court erred in admitting this one statement on the grounds that it was voluntary. That statement was no more voluntary than any of the other statements made at the time Luther Roy was arrested and it is clear from the record of proceedings that the arrest took place when the officers asked Luther Roy to come to the station. The Court says, that Luther Roy "was in custody at the scene." (Rep. of Pro., p. 46).

II.

THE STATE DID NOT MAINTAIN ITS BURDEN OF PROOF THAT DEFENDANT WAS OF THE AGE OF 17 YEARS OR UPWARDS.

The Appellee states that the law is certain that a police officer may give his opinion of a defendant's age based upon his experience where the officer has had an opportunity to observe the defendant, and People vs. Rogers, 415 Ill. 343 is used to support that alleged rule of law. At p. 347 in People vs. Rogers, it is stated that:

> "The only evidence given of the defendant's age was the defendant's admission to the officer of the statement that he was 35 years of age."

The Rogers case was reversed on the grounds that this was not sufficient proof of the defendant's age. The policeman did not in fact give proof of the defendant's age based on the policeman's experience so the case is inapplicable. There is no statement in People v. Rogers, that supports the Appellees contention that the general rule of law is that a policeman may give his opinion of age based upon the policeman's experience or without a corroborative description of the defendant which could be preserved for the record.

The Appellee states that the Kielczewski case cited by Defendant-appellant is a case where there was a jury involved. We contend that the rule of law is clear that the reviewing court should have a record of the observations on which the defendant's age was decided and the rule of law does not include a statement about presence or absence of a jury.

The Appellee contends that there must be a specific objection to evidence related to the defendant's age. We contend that there was a specific objection to testimony related to age (Rep. of Pro., p. 109).

Appellee contends that the defendant, by his own testimony, proved his own age when the appellant put on his own defense. We would point out that the reference made by Appellee apply to testimony given under cross-examination. The State in prosecuting should not take advantage of the defendant in this way. The State has an obligation to prove its case which it did not do. When there is a ruling against the defendant to dismiss, defendant was forced to defend himself and made no offer of proof of age. Questions as to defendant's age were outside the scope of cross-examination and there was an objection made by the attorney for the defendant (Rep. of

Pro. 174).

III.

THE EVIDENCE DID NOT PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT AND THE TESTIMONY OF THE COMPLAINING WITNESS WAS NOT CORROBORATED NOR CLEAR AND CONVINCING.

We think that the record clearly show that the crime was not established by clear, convincing and corroborated testimony. There was no evidence whatsoever relating to the crime of the indecent liberties. There is, corroboration merely as to some related facts. However, as stated in the Brief, we have only the testimony of a 13-year old boy that the indecent liberties were taken which testimony is not clear, convincing, and proof beyond a reasonable doubt, nor was it corroborated.

CONCLUSION

For the reasons set forth above and in the original Brief, the defendant-appellant requests that the judgment of the Circuit Court of Cook County be reversed or, in the alternative, reversed and remanded for a new trial.